Ninth Circuit Concludes that Admissibility is Not a Factor in Deciding Class Certification

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On May 3, 2018, in *Sali v. Corona Medical Center, et al.*, Case Number 15-56460, a putative wage-hour class action, the U.S. Court of Appeals for the Ninth Circuit held that evidence does not have to be admissible for it to be considered in support of class certification. The Ninth Circuit concluded that the district court erred by striking a declaration at the class certification stage because district courts cannot “decline to consider evidence solely on the basis that the evidence is inadmissible at trial.” *Id.* at 10.

In support of their motion for class certification, Plaintiffs submitted a declaration from a paralegal at Plaintiffs’ counsel’s law office summarizing the named Plaintiffs’ injuries after a review of the time and payroll records for the named Plaintiffs. *Id.* at 11. Defendants objected to the declaration on various grounds, including that it constituted improper lay opinion testimony, the opinions were unreliable, the declaration lacked foundation and the data underlying the analysis was unauthenticated hearsay. *Id.* In response to Defendants’ objections, the named Plaintiffs submitted declarations authenticating the data relied upon and the conclusions reached in the paralegal’s declaration. *Id.* at 11-12. The district court agreed with the arguments raised by Defendants and struck the declaration based on inadmissibility. The district court also declined to consider the subsequent declarations submitted by the named Plaintiffs because they “were new evidence improperly submitted in reply.” *Id.* at 12. Once the district court struck the declarations, the district court concluded that the motion for class certification did not offer any admissible evidence of Plaintiffs’ injuries and denied class certification. *Id.* at 8.

The Ninth Circuit reversed the district court’s ruling and held: “Although we have not squarely addressed the nature of the ‘evidentiary proof’ a plaintiff must submit in support of class certification, we now hold that such proof need not be admissible evidence. Inadmissibility alone is not a proper basis to reject evidence supported in support of class certification.” *Id.* at 14. The Ninth Circuit continued:

“[I]n evaluating a motion for class certification, a district court need only consider ‘material sufficient to form a reasonable judgment on each [Rule 23(a)] requirement.’ The court’s consideration should not be limited to only admissible evidence . . . By relying on admissibility alone as a basis to strike [the declarations], the district court rejected evidence that likely could have been presented in an admissible form at trial . . . When conducting its ‘rigorous analysis’ into whether the Rule 23(a)
requirements are met, the district court need not dispense with the standards of admissibility entirely. The court may consider whether the plaintiff’s proof is, or will likely lead to, admissible evidence . . . But admissibility must not be dispositive. Instead, an inquiry into the evidence’s ultimate admissibility should go to the weight that evidence is given at the class certification stage.” Id. at 15-18.

Under Sali, employers in the Ninth Circuit have lost one arrow in their quiver to defeat class certification because they can no longer rely on inadmissibility of evidence to support class certification even if such evidence would be inadmissible at the summary judgment/adjudication stage or at trial. There is a split among several of the circuits on this issue, and perhaps the issue may be taken up by the U.S. Supreme Court for a definitive answer.

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